No. 85-788

Supreme Court, U.S.
FILED
DEC 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH BOGARAT,

Petitioner,

v.

MARK ANTHONY EMERSON, WILLARD W. EMERSON, d/b/a WILLARD EMERSON & SONS, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, ALEC JUDD NICHOLS AND SUSAN V. NICHOLS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the Southern District of Georgia abused its discretion in permitting limited inquiry into previous felony convictions, after a determination that their probative value outweighed any prejudice and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

2. Whether the Petitioner has waived any complaint of error for failure to object to that inquiry into previous felony convictions and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

3. Whether the United States District Court for the Southern District of Georgia's instruction that the jury could not presume negligence was a proper statement of the law in Georgia and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

4. Whether the United States District Court for the Southern District of Georgia's refusal to charge last clear chance was a proper reflection of the law when there was no evidence that the petitioner was negligent and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

5. Whether the United States District Court for the Southern District of Georgia properly corrected any misconception caused by statements of

Respondents' counsel in his closing argument and whether the United States Court of Appeals for the Eleventh Circuit erred in affirming the District Court's ruling.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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STATEMENT OF THE CASE

Respondents will accept the Petitioner's rendition of the proceedings below, noting that the jury awarded the plaintiff $36,000.00 against Alec Judd Nichols and Susan V. Nichols.

Respondents will accept the Petitioner's rendition of the facts with these additional notations proffered in this Brief in Opposition to Petitioner's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The United States District Court for the Southern District of Georgia acted properly in permitting limited inquiry into the Petitioner's felony convictions for purposes of impeachment. The District Court properly determined that the probative value of the evidence outweighed any prejudice.

The District Court correctly instructed the jury that they may not presume negligence from the fact that a collision occurred. As there was no evidence of the Petitioner's negligence, the District Court properly referred to instruct on last clear chance. Any misconception caused by statements by Respondents' counsel were rectified by the District Court's instruction to the jury.

The Court of Appeals for the Eleventh Circuit did not err in affirming the District Court's decision.

ARGUMENT

A. The United States District Court For The Southern District Of Georgia Acted Properly In Permitting One Question And One Response As To Petitioner's Felony Convictions And The Eleventh Circuit Court Of Appeals Did Not Err In Affirming The Trial Court's Ruling.

Federal Rule of Evidence 609(b) provides in pertinent part:

> [E]vidence of a conviction . . . is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b) affords a trial court judge discretion to determine whether or not the specific facts and circumstances of a given case allow the introduction of evidence of criminal convictions occurring more than ten (10) years prior to the trial proceeding at hand. The United States District Court for the Southern District of Georgia properly permitted limited inquiry as to the petitioner's prior criminal convictions.

On two occasions, in his answers to interrogatories and in his first deposition, the petitioner lied about having any prior criminal convictions. It was not until the petitioner's second deposition that the following three felony convictions were addressed:

(1) A federal felony in 1946 for impersonating a Naval officer. Sentence was eighteen months. Time served was six months in federal prison in Chillicothe, Ohio.

(2) A Michigan state felony in late 1940's for "bad checks." Sentence was eighteen months. Time served was six months in Michigan State Prison.

(3) A New York state felony about 1955 for "Grand Larceny in the Second Degree, to-wit, uttering a fraudulent check for $200.00." Sentence was four years. Time served was two years at Attica State Penitentiary. (R. 156-157.)

The trial court held that the petitioner's lying on two occasions concerning his three prior criminal convictions brought his credibility into issue. (T. 9) The Court fashioned a ruling to which respondents' counsel adhered. The Court held that:

> "[I]f Mr. Bogarat should assume the witness stand, and I would assume that he would, if he is confronted on cross-examination, and I am sure that he will be, did he tell a falsehood in his answers to interrogatories and in his depositions about previous, some convictions that occurred in the 40's and 50's, impersonating an officer, or whatever, and that is the extent. And if he says 'yes, I did not relate that," that is the end of it. If he denies it, then we are going through every one of them." (T.11)

Respondents' counsel complied with the District Court's ruling. The entire error as asserted by Petitioner is contained in one question and one response:

MR. MIKELL:

> Q: Mr. Bogarat, after this lawsuit was filed, twice prior to today under oath in this lawsuit you have lied about old felony convictions from the 1940's and 1950's; is that true?
>
> A. I admitted that, yes, sir.

Respondents' counsel did not exceed the parameters outlined by the District Court.

Rule 609(b) requires that a District Court must find that the probative value of the conviction substantially outweighs its prejudicial impact, and that it support that finding with an identification of the specific facts and circumstances which underlie its decision. *United States v. Cavender*, 578 F.2d 528 (4th Cir. 1978). The District Court in the case at hand had available the briefs of both parties (R. 147, 156-160), and oral argument detailing specific facts and circumstances (T. 7-ll). The District Court took careful note that these convictions were indeed felony offenses and made a determination that the probative value of admitting this evidence outweighed its prejudicial effect (T. 9-11).

The Petitioner had lied under oath on two occasions about his three previous felony convictions. In his present action, there is no concern that the jury might misuse the prior convictions as evidence of guilt. With the civil proceeding involving divergent stories of how the automobile accident took place, the jury is entitled to hear that the Petitioner made sworn statements three months prior to trial that were false. The Petitioner's credibility was called into issue and the District Court properly allowed limited inquiry as to those convictions for impeachment purposes.

Although the District Court did identify the specific facts and circumstances underlying its decision, a lesser standard has been allowed where the record indicates that the trial judge made a thorough and thoughtful analysis of the issue and had based his conclusion upon various factors which were then before him. *United States v. Cohen*, 544 F.2d 781 (5th Cir. 1977), reh. den., 546 F.2d 907 (5th Cir. 1977); and cert. den., 431 U.S. 914 (1977). The record in the case at hand certainly depicts a careful analysis and a strictly fashioned rule (T. 8-11).

The District court properly permitted limited inquiry into the Petitioner's felony convictions and the Eleventh Circuit Court of Appeals did not err in affirming the District Court's ruling.

B. The Petitioner Has Waived Any Complaint Of Error As He Failed To Object Timely and Properly And The United States Court Of Appeals For The Eleventh Circuit Did Not Err In Affirming The District Court's Decision In This Regard.

Even assuming that the conviction testimony was erroneously admitted, the Petitioner did not timely object and thus has not waived any error. Federal Rule of Evidence 103 states the requirements for a timely objection to be considered on appeal. Error may only be predicated upon this particular ruling if: (1) a party's substantial right is involved *and* (2) a timely objection appears of record, stating the specific ground of objection. Rule 103(a)(1).

The Appellant did not object to the question eliciting his felony convictions (T. 179). He did object to more recent arrests, and was sustained (T. 179-180). His failure to object to that question is fatal to his assertion here that the testimony was illegally ad-

mitted. *See*, e.g. *U.S. v. Forgione*, 487 F.2d 364 (1st Cir. 1973), *U.S. v. Bryant*, 480 F.2d 785 (2d Cir. 1973).

Thus, the Petitioner has failed to preserve this issue on appeal and, on that basis, the trial court must be upheld.

C. The United States District Court For The Southern District Of Georgia's Instructions As To Negligence Was Not An "Accident Charge" And Was A Proper Reflection Of The Law And The Evidence. The United States Court Of Appeals For The Eleventh Circuit Did Not Err In Affirming The District Court's Decision In This Regard.

The Petitioner assigns error to the Court's jury instruction and broad brushes it as an "accident charge." First, the charge was not the usual accident charge. Secondly, assuming this Court were to extend the "accident charge" cases, the Petitioner has not demonstrated any harm. Thus, on either ground, the charge was properly given.

First, the objectionable charge was not an accident charge, but a negligence charge. The Court did *not* define "accident,"*Cohran v. Douglasville Concrete Products*, 153 Ga. App. 8 (1980); *Cobb v. Big Apple*, 106 Ga App. 790, 791 (1962). The Court did *not* instruct the jury that the plaintiff was barred from recovery in such an instance, *Trammell v. Williams*, 97 Ga. App. 31, 34 (1958). The Court did *not* teach the jury that the plaintiff could not prevail if the asserted negligence of another, whether or not a party, was the cause of plaintiff's injuries. *Palmore v. Stapleton*, 157 Ga. 691 (1981). The Court did not charge on any semblance of sudden emergency, *Boatright v. Sosebee*, 108 Ga. App. 19 (1963). Any one or

all of those instructions may have been overruled by *Chadwick v. Miller*, 169 Ga. App. 338, 344 (1983).

But the instruction complained of is not the standard "accident charge" discussed in *Chadwick, supra.* Rather, the trial court charged on presumption and negligence. The word "accident" is merely incidental; the Court could have substituted "collision" and rendered the same instruction, i.e.,

> The fact that [a collision] happened does not raise a presumption of negligence on the part of any party, and does not create a right of recovery by Plaintiff.

The charge correctly stated that the occurrence of an event does not permit a jury to presume negligence.

In an action for negligence, "[the] burden of proof rests upon the plaintiff to establish the negligence of the defendant and its causal relation to the claimed injury and damage. O.C.G.A. § 24-4-1; [Cits.]" *Maloy v. Dixon*, 127 Ga. App. 151, 154 fn.1 (193 SE2d 19) (1972) "The law raises no presumption whatever as to who was to blame. The burden is on the plaintiff to show that defendant was negligent." *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 108 (1903); *Forehand v. Pace*, 146 Ga. App. 682, 683 (1978). The instruction correctly stated the applicable law and its issuance was sound. See also *Hay v. Carter*, 94 Ga. App. 382 (1956).

If this Court were to expand and elaborate on the trial court's charge, converting it into an "accident charge," the Petitioner could still not prevail. The Petitioner has not demonstrated that the charge was

a misstatement of the law, misleading or confusing to the jury. Thus, the charge does not constitute reversible error and the jury's verdict should be sustained.

D. The United States District Court For The Southern District Of Georgia Properly Refused To Give A "Last Clear Chance" Instruction Because There Was No Evidence That The Petitioner Was Negligent. The United States Court Of Appeals For The Eleventh Circuit Did Not Err In Affirming The District Court's Decision In This Regard.

The "last clear chance" charge evolved from the case of *Louisville & Nashville Railroad Co. v. Patterson*, 77 Ga. App. 406 (1948).

That case has been revisited on numerous occasions. The rule that has survived is simply this: The last clear chance doctrine applies only when there is a negligent plaintiff. *Atlantic Coast Line Railroad Co. v. Coxwell*, 93 Ga.App. 159 (1955); *Georgia Northern Railway Co. v. Hathcock*, 93 Ga. App. 72 (1955); *Hirsch v. Chapman*, 109 Ga. App. 444 (1964); *Walker Hauling Co. v. Johnson*, 110 Ga. App. 620 (1964); *Stroud v. Willingham*, 126 Ga. App. 156 (1972); *Mealy v. Slaton Machinery Sales, Inc.*, 508 F.2d 87 (5th Cir. 1975).

The Petitioner meekly suggests that "there was a jury issue as to the negligence of the Appellant" without one citation to the record. If there was any such evidence, it escaped the court[1] and the plaintiff's attorney.[2]

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[1]THE COURT: Well, does the case law say that in order to bring a last clear chance charge the Plaintiff must be the driver?

The evidence was far to the contrary. The plaintiff Bogarat testified that he was a passenger on the right-hand side of Mr. Nichols' car (T. 168). Mr. Bogarat testified that he was not distracting Mr. Nichols in any way immediately prior to the contact of the truck (T. 169).

Thus, the trial court correctly noted the absence of any evidence that the Plaintiff was negligent and properly denied a charge on last clear chance. That ruling is in accord with the Georgia law and the evidence presented and must be upheld.

E. The United States District Court For The Southern District Of Georgia Properly Corrected Any Misconception Caused By Statements Of Respondents' Counsel In His Closing Argument And The United States Court Of Appeals Did Not Err In Affirming The District Court's Ruling.

The Petitioner alleges that Respondents' counsel's remarks in his closing argument about Petitioner's manipulating the system unfairly prejudiced his ability to recover. The Petitioner does not cite a single case authority for reversal on these grounds. Upon counsel

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(T. 197-198)

THE COURT: I think it would simply be that, from the evidence that I have heard, he is not responsible for the negligence if any of Mr. Nichols. (T. 198)

THE COURT: Well, I am not even going to charge regarding his negligence, because I have not heard anything that indicates he is negligent. (T. 198)

[2]MR. HARTRIDGE: . . . We've got a man, we submit, who is absence of negligence himself; . . . (T. 198)

MR. HARTRIDGE: . . . My client is sitting there as a guest passenger in the right front seat of a car. There's been no evidence that he did anything wrong, we submit. (T. 197)

for Petitioner's objection, the trial judge at the District Court level properly corrected any misconception the jury may have formed. The District Court acknowledged Respondent Mr. Nichols' certificate of bankruptcy and ruled that it was presumed to have been validly granted. He also informed counsel and the jury panel that there was no testimony concerning the Petitioner being in bankruptcy (T. 401).

Any misconception caused by statements of Respondents' counsel was corrected by the District Court at the trial.

CONCLUSION

The trial court properly permitted limited inquiry into previous felony convictions. The court determined that their probative value outweighed any prejudice.

The District Court judge correctly charged the jury. There was no "accident charge" given and a "last clear chance" charge was not permitted by Georgia law.

The District Court properly corrected any misconception caused by statements of Respondents' counsel in his closing argument.

For all these reasons, the Respondents urge this Court to affirm the jury's verdict against the Defendants Alec Judd Nichols and Susan V. Nichols, and to affirm the United States Court of Appeals for the Eleventh Circuit by denying the Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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